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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-487

THE STATE OF OKLAHOMA,
Petitioner,

v.

THE CHEROKEE NATION, THE CHOCTAW NATION, and THE CHICKASAW NATION,
Respondents.

REPLY TO RESPONSE OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA AND BRIEF OF RESPONDENTS EASON OIL COMPANY, *ET. AL.*, IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF STATE OF OKLAHOMA

EARL BOYD PIERCE
ANDREW C. WILCOXEN
PAUL M. NIEBELL
MICHAEL S. YAROSCHUK
Counsel for the Cherokee Nation

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-497

THE STATE OF OKLAHOMA,
Petitioner,

v.

THE CHEROKEE NATION, THE CHOCTAW NATION, and THE CHICKASAW NATION,
Respondents.

REPLY TO RESPONSE OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA AND BRIEF OF RESPONDENTS EASON OIL COMPANY, *ET. AL.*, IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF STATE OF OKLAHOMA

PRELIMINARY STATEMENT

On October 12, 1972 and October 24, 1972, the Commissioners of the Land Office of the State of Oklahoma and the Eason Oil Company and the Mobil Oil Corporation filed pleadings in this Court under the guise of

responses to the Petition for Writ of Certiorari which had been filed by the State of Oklahoma. These pleadings are not responses, but are, in truth, additional petitions for certiorari, raising new questions for consideration and furnishing new arguments not raised in the Petition of the State of Oklahoma. The parties who have filed these pleadings were and are the same parties who were joined as defendants in the original action for an accounting and whose interests throughout the proceeding thus far, in all previous briefs in the Court of Appeals and in this Court have been represented by the State of Oklahoma. The pleadings filed by the Commissioners of the Land Office and the two oil companies are procedurally defective and substantively infirm.

PROCEDURAL DEFECTS

The United States Court of Appeals for the Tenth Circuit entered its order denying the request for a rehearing filed on behalf of the appellants on June 27, 1972. Pursuant to the requirements of the 28 U.S.C.A. 2101(c) any writ of certiorari intended to bring any judgment or decree in a civil action before the Supreme Court for review shall be applied for within ninety days after the entry of such judgment or decree. The ninety day period for petitioning for writ of certiorari has been considered by this Court to be a jurisdictional matter. Application for certiorari must be made within the time limits provided by law. *Bradford Electric Light Co., Inc. v. Clapper, N.H.*, 284 U.S. 221; *Citizens Bank v. Opperman*, 249 U.S. 448. See also *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; *Nebraska v. Pink*, 317 U.S. 264. Accordingly any and all petitions for certiorari in this case had to be filed no later than September 25, 1972.

Rule 21(6) of the Supreme Court Rules specifically provides:

> "... All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers provided for the petitioner, except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition."

The Commissioners of the Land Office and Eason Oil and Mobil Oil are not respondents as that term is generally understood. The petition filed by the State of Oklahoma represent their interests. See *Provident Trademens B&T Co. v. Lumbermens Mutual Casualty Co.*, 411 F.2d 88 (3d cir. 1969).

The pleadings filed by these parties raise new questions and new arguments properly required to be set forth in a Petition for Certiorari.

These parties have ignored the jurisdictional time limits established for review. The Commissioners of the Land Office of the State of Oklahoma filed their pleading on October 12, 1972 fully 107 days after the date of the order denying rehearing and only thirteen days prior to the date when the opposition of the Cherokee Nation or any other opposing party would be due. Eason Oil and Mobil Oil filed their pleading on October 24, 1972 fully almost 120 days after the date of the denial of the rehearing, and indeed, after the opposition of the Cherokee Nation had been filed. These parties have made no attempt to comply with the Rules of this Court. The filing of such late pleadings prejudices the rights of the Cherokee Nation and any party seeking to oppose such petitions.

Pursuant to the Rules of this Court briefs in Opposition must be filed within 30 days after receipt of a petition. Yet during this period while the Cherokee Nation was

preparing its opposition to what should have been the petition for all parties, additional arguments and questions were being prepared by the Commissioners of the Land Office, Eason and Mobil. Indeed the Cherokee Nation never received a copy of the Eason-Mobil pleading prior to the filing of its opposition. Such conduct violates elemental fairness and should not be condoned.

SUBSTANTIVE INFIRMITIES

A. Commissioners of the Land Office

The Commissioners of the Land Office urge as an additional argument for granting the petition that the fact that after Statehood the Indians did not sell sand or gravel evidences a tacit meeting of the minds that title to the river did indeed pass to the State of Oklahoma. Such argument is specious and has already been foreclosed by the prior decision of this Court. This Court clearly recognized the fee simple nature of the Cherokee Nation's title which was not the usual Indian title of use and occupancy. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634-636.

Whether the Indian Nations, after Statehood, did or did not take sand and gravel from the river bed is not a decisive fact. As a practical matter under the State Court decisions existing prior to this Supreme Court decision, the Indians were prohibited from exercising any right of ownership. The exercise of the Indians' rights of ownership is precisely what this suit is all about and what this Court has already decided.

B. Eason Oil Company and Mobil Oil Corporation

These parties have raised in their pleading an entirely new and different question for review. These Oil Companies

assert that as lessees they were denied the right to be heard on the question of their rights under the leases with the State. This argument is not new or persuasive. This precise question was submitted to the District Court for decision and briefed by all parties. The State of Oklahoma and the various Oil Companies presented the District Court with this argument and facts here presented. The Oil Companies have had their day in court. The District Court, sitting as a Court in Equity, reached the fairest and best result in a difficult situation. The Court of Appeals recognized that fact in its affirmance. *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674, 679-680 (10th cir. 1972). The District Court did not act arbitrarily or capriciously, but in accord with the operable decisions. See *Minski v. United States*, 131 F.2d 614 (CCA Mich. 1943) aff'd 319 U.S. 463.

Due process requirements are flexible and differ in response to the nature of the proceeding and character of the rights affected. *Hunter v. City of Ann Arbor*, 325 F. Supp. 847 (D.C. Mich. 1971). In the case here presented the District Court did not abuse its discretion in formulating the relief to be afforded the parties.

CONCLUSION

For the reasons here stated, the pleadings filed by the Commissioners of the Land Office of the State of Oklahoma and by the Eason Oil Company, *et. al.*, should be rejected and the Petition for Writ of Certiorari denied.

Respectfully Submitted,
EARL BOYD PIERCE
ANDREW C. WILCOXEN
PAUL M. NIEBELL
MICHAEL S. YAROSCHUK

November, 1972

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 1972, three copies of the Petition for Writ of Certiorari were mailed, with postage prepaid thereon, to all parties required to be served as follows:

Mr. Lon Kile
Kile & Rabon
114 North 2nd Street
Hugo, Oklahoma 74743

Mr. R. R. Williamson
Commissioners of the Land Office
State Capitol Building
Oklahoma City, Oklahoma 73105

Mr. Jay R. Bond
Ross, Holtzendorff & Bond
1619 First National Building
Oklahoma City, Oklahoma 73012

Mr. J. R. Kennedy
Eason Oil Company
P. O. Box 18755
Shartel Station
Oklahoma City, Oklahoma

Odie A. Nance
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma
73105

MICHAEL S. YAROSCHUK
Counsel for
Cherokee Nation